

## **INITIAL STATEMENT OF REASONS**

### **ADMINISTRATIVE REQUIREMENT OR OTHER CONDITION OR CIRCUMSTANCE THAT THE REGULATORY ACTION INTENDED TO ADDRESS**

#### **AMENDMENT OF**

#### **Section 599.960 and 599.963**

The proposed amendments to the Department of Personnel Administration's (DPA) existing rules on drug and alcohol testing for excluded and exempt peace officer employees and employees in sensitive positions would allow State employers to conduct random and reasonable suspicion testing using the testing procedures specified in Federal Regulations. The proposed amendments are needed to assist State employers who test their employees for drugs and alcohol at work.

#### Statement of Problem

The State currently conducts pre-employment testing for applicants, reasonable suspicion testing for safety sensitive designated positions, and random testing for peace officer employees. The State also conducts random, reasonable suspicion, pre-employment, post-incident and follow-up testing of commercial drivers as required by the Federal Motor Carrier Safety Administration regulations.

In 1988, DPA adopted regulations that established a reasonable suspicion drug and alcohol policy under which employees serving in sensitive positions were subject to reasonable suspicion testing. In 1998, The State employer reached a collective bargaining agreement with the union representing the State's correctional peace officers (California Correctional Peace Officers Association) under which rank-and-file correctional peace officers hired after April 15, 1998 were subject to random substance testing. DPA adopted regulations in 2001 that established a similar program for correctional peace officers at the supervisory and managerial levels.

In April 2000, DPA submitted random drug testing rules to OAL for adoption. The rules require the random drug and alcohol testing of excluded and exempt California Department of Corrections and Rehabilitation (CDCR) and California Youth Authority (CYA) peace officer employees. These rules became operative on January 23, 2001.

## Procedures for Workplace Drug and Alcohol Testing

The existing DPA Regulation 599.963, specifies the procedures for drug and alcohol testing and are, in part, similar to some of the procedures outlined in the Federal Regulations for drug and breath alcohol testing programs. These include:

- (d) Notwithstanding (c), the Department shall use cutoff levels for substances listed in (b)(1) through (5) as established in SAMHSA, Mandatory Guidelines for Federal Workplace Drug Testing Programs, Subpart B, Section 2.4, Part (e) and Part (f), 59 FR 29916 dated June 9, 1994, and 62 FR 51118 dated September 30, 1997. For alcohol (b)(9) the Department shall use the Federal Motor Carrier Safety Administration alcohol concentration cutoff level as described in Part 382 – Controlled Substances and Alcohol Use and Testing, Section 201, 49 CFR dated July 25, 1995.
- (f) The Department shall use chain of custody procedures similar to those used by SAMHSA to ensure that a strict chain of custody is maintained for the sample from the time it is taken, through the testing process, to its final disposition.
- (g) Drug tests shall be performed by a commercial laboratory that is certified by SAMHSA (pursuant to Mandatory Guidelines for Federal Workplace Drug Testing Program, Federal Register, Vol. 53, No. 69.

The Federal Motor Carrier Act Regulations, Title 49, Part 40, specify procedures and processes that encompass the full range of drug testing, from the point of collecting specimens, to the laboratory analysis, result reporting and assessment and referral for drug and alcohol users. These regulations are used by the State to conduct random testing of State employees who are commercial drivers.

Section 599.963 does not incorporate all of the Federal regulations, only those specified above. Because the DPA rules do not encompass all of the Federal Regulations, CDCR and other employers are precluded from using the drug and alcohol testing procedures and processes specified in the Federal regulations for their drug and alcohol testing programs. This creates inconsistency and inefficiency in the State drug testing programs.

DPA seeks to amend Section 599.963 of the substance testing rules to incorporate the Federal Motor Carrier Act Regulations, Title 49 Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs, Subparts A – N, P and Q of the U.S. Department of Transportation Regulations. This will create consistency across the entire employment pool affording greater efficiency in government operations.

## Breath Alcohol Testing

Section 599.963 contains references to standards and procedures which are used by the State to conduct drug and alcohol testing. These standards and procedures are being revised to incorporate the changes that have been made in the State's policy for breath alcohol testing.

Under Section 599.963 (a) the existing language states that the "alcohol testing process shall be one that is scientifically proven to be at least as accurate and valid as (1) urinalysis using an enzymatic assay screening test, with all positive screening results being confirmed using gas chromatography before a sample is considered positive or (2) breath sample testing using breath alcohol analyzing instruments which meet the State Department of Health Services standards specified in Title 17, Division 1, Chapter 2, Subchapter 1, Group 8, Article 7, Sections 1221.2 and 1221.3 of the California Code of Regulations".

Under Section 599.963 (a), the language stating "(1) urinalysis using an enzymatic assay screening test, with all positive screening results being confirmed using gas chromatography before a sample is considered positive" is being eliminated because State policy has eliminated the use of urinalysis for alcohol testing and instead uses evidential breath alcohol testing instruments to conduct alcohol testing as specified in the Federal regulations.

Under Section 599.963 (a), the existing language states that the State will use "(2) breath sample testing using breath alcohol analyzing instruments which meet the State Department of Health Services standards specified in Title 17, Division 1, Chapter 2, Subchapter 1, Group 8, Article 7, Sections 1221.2 and 1221.3 of the California Code of Regulations".

This language is being eliminated because only breath alcohol testing instruments specified in the Federal regulations are used by the State to conduct alcohol testing. The language is being revised to incorporate the Federal Motor Carrier Act Regulations, Title 49, Part 40, Subpart K, Sections 40.229 and 40.231 which specifies the types of breath alcohol instruments used by the State to conduct alcohol testing.

## Cutoff Levels

Under Section 599.963 (d), the existing language states that "notwithstanding (c), the Department shall use cutoff levels for substances listed in (b)(1) through (5) as established in Substance Abuse and Mental Health Services Administration (SAMHSA), Mandatory Guidelines for Federal Workplace Drug Testing Programs, Subpart B, Section 2.4, Part (e) and Part (f), 59 FR 29916 dated June 9, 1994, and 62 FR 51118 dated September 30, 1997. For alcohol (b)(9) the Department shall use the Federal Motor Carrier Safety Administration alcohol

concentration cutoff level as described in Part 382 – Controlled Substances and Alcohol Use and Testing, Section 201, 49 CFR dated July 25, 1995”.

The language citing the dates and Federal Register numbers for the Mandatory Guidelines for Federal Workplace Drug Testing Programs (59 FR 29916 dated June 9, 1994 and 62 FR 51118 dated September 30, 1997) and for alcohol testing (July 25, 1995) are being eliminated. The Federal Regulations have since been updated (April 13, 2004) and the references to the Federal Register are no longer valid. Instead, the State will reference the Mandatory Guidelines for Federal Workplace Drug Testing Programs, Subpart B, Section 2.4, Part (e) and Part (f), 69 FR 19644 dated April 13, 1994, and for alcohol cutoff levels, Part 382 – Controlled Substances and Alcohol Use and Testing, Section 201, 49 CFR.

#### Commercial Laboratories

Under Section 599.963 (g), the existing language states that “drug tests shall be performed by a commercial laboratory that is certified by SAMHSA (pursuant to Mandatory Guidelines for Federal Workplace Drug Testing Program, Federal Register, Vol. 53, No. 69 or which meets the standards used by the College of American Pathologists (CAP) to accredit laboratories for forensic urine drug testing (Standards for Accreditation, Forensic Urine Drug Testing Laboratories, College of American Pathologists)”.

The language referencing Federal Register, Vol. 53, No. 69 is being eliminated. The Federal Regulations have since been updated, and the reference to the prior Federal Register is no longer valid. Instead, the State will now reference the SAMHSA Mandatory Guidelines for Federal Workplace Drug Testing Program, 69 FR 19644 dated April 13, 2004.

Under Section 599.963 (g), the language stating “the standards used by the College of American Pathologists (CAP) to accredit laboratories for forensic urine drug testing (Standards for Accreditation, Forensic Urine Drug Testing Laboratories, College of American Pathologists)” is being eliminated. The only laboratories used by the State to conduct workplace drug and alcohol testing are those certified by SAMHSA.

#### Section 599.960 General Policy

The State is amending Section 599.960 to allow for periodic follow-up testing for employees who refuse to submit to drug or alcohol testing under Section 599.960(c) and (e).

The existing language in Section 599.960 allows periodic follow-up testing as a condition of remaining in or returning to State employment under Section 599.960 (c). The circumstances under which a follow-up test may be conducted are:

- when an employee has already been found in violation of subsection (b) through the adverse action or medical examination processes under the Civil Service Act (Government Code 19253.5; Government Code Sections 19570-19593);
- as a result of substance abuse testing under this article (Section 599.960); or by the employee's own admission.

The proposed amendment would also allow the State to employ the processes set forth in the Federal regulations when an employee who has been ordered to take a drug or alcohol test and refuses to take a test. Under the Federal regulations, a refusal to test is considered a positive test and follow-up testing is required.

This proposed amendment would expand the circumstances under which an employer could schedule periodic follow-up testing when employees violate the State's substance abuse testing policies.

#### Section 599.965 Medical Review Officer

Under Section 599.965, the existing language states "each appointing power shall designate one or more Medical Review Officers who shall be licensed physicians who meet Federal SAMHSA requirements as described in 59 FR 29908, Mandatory Guidelines for Federal Workplace Drug Testing Programs, Subpart A, Section 1.2 Definitions, dated June 9, 1994".

The language referencing 59 FR 29908 and June 9, 1994 is being eliminated. The Mandatory Guidelines have since been updated (April 13, 2004) and the references to the Guidelines are no longer valid. Instead, the State will reference 69 FR 19644, Mandatory Guidelines for Federal Workplace Drug Testing Programs, Subpart A, Section 1.2 Definitions, dated April 13, 2004. Additionally, the State is incorporating Subpart B, Section 2.6 which further specifies the qualifications for a Medical Review Officer.